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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1341

RAY H. PAGE, Warden,
Petitioner,

VERSUS

FRANK NACEO MARTIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent, Frank Naceo Martin, prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Martin* v. *Page*, 417 F.2d 309 (1969). The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported as *Martin* v. *Page*, 444 P.2d 830 (1968). The opinion of the United States District Court for the Western District of Oklahoma is not reported but appears at Appendix "B" of Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 28, 1969. The Petitioner seeks to invoke jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The question presented by the Petitioner is, did Respondent meet his burden of proof under 28 U.S.C. 2254(d) and (e).

STATEMENT OF THE CASE

The Statement of the Case made by the Petitioner is substantially correct.

STATEMENT OF FACTS

Frank Naceo Martin, an indigent, nineteen-year-old Negro male, was arrested at approximately noon Saturday, January 12, 1952, by officers of the Oklahoma City Police Department. Without being advised of his right to counsel or of his right to remain silent, Mr. Martin purportedly made two (2) alleged confessions. The first alleged confession was purportedly taken three (3) hours after the arrest January 12, 1952. The second alleged confession was purportedly taken by the Oklahoma City Police Department January 15, 1952, at 11:30 a.m., after their prisoner had been beaten. Mr. Martin had been advised by the Oklahoma City Police Department at the time that each alleged confession was taken that if he cleared up certain matters,

he would receive a sentence of ten (10) years' imprisonment. Mr. Martin relied upon these promises.

After an unnecessary and unexplained delay of four (4) days, on January 16, 1952, a Preliminary Information alleging rape in the first degree was filed against the Respondent in Justice of the Peace Court Case No. 1045. On January 24, 1952, Respondent was summarily bound over to the District Court of Oklahoma County, State of Oklahoma, in District Court Case No. 20850, without being advised of his right to counsel or of any other rights, and without knowingly and voluntarily waiving the Preliminary Hearing.

On January 16, 1952, four (4) days after Mr. Martin's arrest, another Preliminary Information alleging rape in the first degree was filed against him in Justice of the Peace Court Case No. 1309. On the same day, January 16, 1952, Respondent was summarily bound over to the District Court for Oklahoma County, State of Oklahoma, in District Court Case No. 20830, without being advised of any of his rights, including his right to counsel, and without knowingly and voluntarily waiving his right to the Preliminary Hearing.

On January 16, 1952, four (4) days after Mr. Martin's arrest, another Preliminary Information alleging robbery with firearms was filed against him in Justice of the Peace Court Case No. 1044. On January 24, 1952, Respondent was summarily bound over to the District Court for Oklahoma County, State of Oklahoma, in District Court Case No. 20848, without being advised of any of his rights, including his right to counsel, and without knowingly and voluntarily waiving his Preliminary Hearing.

An Order appointing the Public Defender, Charles W. Moss, as counsel in Case No. 20830 was entered in the District Court of Oklahoma County, State of Oklahoma, on the 18th day of January, 1952, six (6) days after the arrest was made and six (6) days after the alleged confession was taken. Mr. Moss was again appointed as counsel on January 25, 1952, by Orders entered in the District Court of Oklahoma County, State of Oklahoma, in Case Nos. 20848 and 20850. These Orders Appointing Counsel were entered thirteen (13) days after the arrest.

On February 6, 1952, twenty-five (25) days after his arrest, Mr. Martin, with the agreement, understanding and firm conviction that he would receive a total sentence of ten (10) years on all of the charges against him, entered pleas of guilty to the charges in the District Court of Oklahoma County, State of Oklahoma, without being advised of his right to a trial by jury or of the possible sentences that he might receive. He did *not* freely and voluntarily enter such pleas of guilty with full knowledge of the nature and consequences of such pleas.

Frank Naceo Martin was sentenced to a term of three (3) life sentences in the State Penitentiary in Case Nos. 20830, 20848 and 20850, and was sentenced to three (3) years in the State Penitentiary in Case No. 19539, larceny of an automobile, and was sentenced to seven (7) years in the State Penitentiary in Case No. 20867, burglary in the second degree. All of the sentences were to run concurrently with the sentence in Case No. 20848. Appellee was *not* advised of his right to appeal from such judgments and sentences.

Mr. Martin served nine years, eleven months and twenty-eight days (9 years, 11 months, 28 days) in the Oklahoma State Penitentiary prior to being paroled. Said parole was revoked on the basis of a municipal bond forfeiture for a charge of occupying a room for immoral purposes, filed in a city court which was *not* a court of record.

On December 26, 1967, a Petition for Writ of Habeas Corpus was filed before the Court of Criminal Appeals of Oklahoma. The Court of Criminal Appeals of Oklahoma, after an evidentiary hearing, denied the Writ on July 17, 1968, as set forth in *Martin* v. *Page*, 444 P.2d 830, and dismissed the Petition for Rehearing.

On August 7, 1968, a Petition for Writ of Habeas Corpus was filed in the United States Court for the Western District of Oklahoma. A full and complete evidentiary hearing was held because the State of Oklahoma had not recorded the testimony given at the state hearing.

At the evidentiary hearing in the United States District Court for the Western District of Oklahoma, Mr. Martin testified that he was beaten by police and promised a ten (10) year sentence before he signed any papers. He testified that while before the Court in Justice of the Peace Case No. 1309, "The only words spoken was said, spoken, was between the Deputy and the Judge, like I said." Mr. Martin testified that, while before the Court in Justice of the Peace Case Nos. 1056 and 1044, he was asked if he had an attorney and he answered, "No, sir, can't afford one. So he (Deputy Sheriff) says, 'We will waive and go to District Court'" (EH 16 and 18).

Mr. Martin testified that he "never had an attorney until about three (3) days before" trial and that when he saw his court-appointed counsel for the only time before trial, the counsel stated, "You understand that I am to represent you in Court and to plead your case guilty." He further testified that he assumed that counsel had made a package deal for ten (10) years (EH 19-20).

Mr. Martin testified that when Judge Morris pronounced sentence, "I got angry and Charlie Moss (Public Defender) was standing there and I started over and I said, I cursed him out pretty good, but I didn't get a chance to whip him very good." The Prosecutor, Roy Semtner, when asked about this attack, testified, "I do vaguely remember something of this kind." Mr. Martin further testified, "Quick as I got this life sentence, they took me out back upstairs again and in about six (6) days later, I was on my way to the penitentiary" (EH 21-23 and 60).

On the 27th day of December, 1968, the United States District Court for the Western District of Oklahoma, finding that the pleas were involuntarily entered, handed down findings of fact and conclusions of law and ordered Mr. Martin released from custody. Notice of Appeal was filed by the Respondent on December 31, 1968, and the United States District Court stayed the release of Mr. Martin during the pendency of the appeal to the United States Court of Appeals for the Tenth Circuit.

The United States Court of Appeals for the Tenth Circuit heard oral argument of the instant case on September 9, 1969. The per curiam opinion of the United States Court of Appeals for the Tenth Circuit was filed on October 28,

1969, and reported as *Martin* v. *Page*, 417 F.2d 309 (1969). In said per curiam opinion, the Court of Appeals did not deem it necessary to consider any other premises for federal relief reflected in the record other than the involuntariness of the pleas of guilty. The United States Court of Appeals for the Tenth Circuit affirmed the Order of the United States District Court for the Western District of Oklahoma.

An Application for Extension of Time Within Which to Petition for Writ of Certiorari was timely filed with the Clerk of this Court by Petitioner. An Order was entered extending the time within which to file a petition for writ of certiorari to and including February 25, 1970. The Petition for Writ of Certiorari was received by the Clerk of this Court on the 9th day of March, 1970. The attorney for Respondent has filed with this Court his Application for Extension of Time Within Which to File Brief in Opposition to Petition for Writ of Certiorari.

This Brief in Opposition to Petition for Writ of Certiorari now comes before the United States Supreme Court.

ARGUMENT

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE

Since the United States Court of Appeals, Tenth Circuit, did not deem it necessary to consider whether any proper premise for federal relief was reflected in the record other than the involuntariness of Respondent's pleas of guilty, and since Petitioner has limited his questions in the Petition for Writ of Certiorari to whether Respondent has

met the burden of proof required under provisions of 28 U.S.C. 2254(d) and (e) in establishing the involuntariness of said pleas, this brief will be limited to those questions.

The United States Court for the Western District of Oklahoma found that where there is a question of violation of an accused's constitutional rights, as was presented in this case, a decision of the highest State Court in a habeas corpus proceeding does not bind the proceeding in Federal Court, even though such decision is entitled to great weight.

In the findings of fact by the United States District Court for the Western District of Oklahoma, the Honorable Luther Bohanon stated in his opinion:

> "8. Prior to the hearing in this Court on December 18, 1968, this Court requested of the Attorney General of the State of Oklahoma, Counsel for Respondent, that a transcript of the proceedings or the testimony had before the Court of Criminal Appeals of the State of Oklahoma upon Petitioner's Writ of Habeas Corpus be furnished for consideration, in order that this Court could determine what evidence and matters were presented to the Court of Criminal Appeals. This request was made to determine exactly what was before the Court of Criminal Appeals in order to determine whether the constitutional questions involved were presented to the Court of Criminal Appeals, and if the evidence was sufficient to sustain the conclusions reached by the Court of Criminal Appeals in the case of *Martin* v. *Page*, supra. By letter dated December 6, 1968, addressed to this Court and from the Attorney General of the State of Oklahoma in re: Frank Naceo Martin, Petitioner, v. Ray H. Page, Warden, Respondent, No. 68-313 Civil, this Court was advised as follows:

'The Court of Criminal Appeals of Oklahoma did hold an evidentiary hearing in the above styled case on Jan. 16, 1968. No record was made of the testimony in this proceeding since the Court has no appropriated funds with which to pay a court reporter.

'I trust this information is sufficient.'

Consequently, this Court is without the benefit of the testimony presented to the Court of Criminal Appeals."

Therefore, in compliance with 28 U.S.C. 2254(e), a full and complete evidentiary hearing was held by the United States District Court for the Western District of Oklahoma.

The Petitioner presented two questions in the Petition for Writ of Certiorari to this Court in this case. In both questions presented, the Petitioner assumes that the Respondent's testimony, which was needed in meeting his burden of proof in establishing the involuntariness of his plea, before the United States District Court for the Western District of Oklahoma was uncorroborated and unsupported testimony.

In order to determine whether a guilty plea was made voluntarily, a two-step inquiry is necessary: first, it must be decided whether improper promise or threats were made by a state official to induce the plea, which requires a determination of what observable physical events and conversations took place; second, if it be found that there were no such official threats or promises, it must be decided whether the Defendant believed such a promise or a threat had been made and whether such belief induced his plea. *U. S. v. Mancusi*, 375 F.Supp. 508.

In seeking to determine voluntary nature of a plea of guilty, cumulative impact on the Defendant of the totality of all surrounding circumstances is what must be considered. The Court must examine data available to Defendant's mind and take into accord the natural strains and anxieties of a person in Defendant's position. *U. S.* v. *Mancusi, supra.*

The United States District Court for the Western District of Oklahoma held an Evidentiary Hearing in this case on Thursday, December 18, 1968. After considering all of the evidence presented at the hearing, the Court found that Respondent "did, in fact, either personally or through his court-appointed counsel, enter pleas of guilty to the charges, but that he did not enter such pleas of guilty voluntarily, knowingly and understandingly, but entered said pleas with the firm conviction that he would receive a sentence of ten (10) years on all of these charges."

> "While a Defendant's surprise at the severity of the sentence will not itself invalidate a plea, it may be evidence of Defendant's belief as to what he was promised in return for his plea." *U. S.* v. *Shneer*, 194 F.2d 598.

The Petitioner has suggested to this Court that there was no evidence of the "promise" other than Mr. Martin's testimony. However, Mr. Martin's testimony was supported by Roy Semtner, who prosecuted the original charges against Respondent, when he testified that he remembered Mr. Martin attacking his court-appointed attorney when the life sentence was pronounced.

At the Evidentiary Hearing before the District Court of the United States for the Western District of Oklahoma,

the Respondent testified that when Judge Morris pronounced sentence, he thought that Charlie Moss, his court-appointed counsel, "doublecrossed" him and that he had tried "to jump on" Mr. Moss. He went on to testify that he was removed from the courtroom immediately, without being advised of his right to appeal or of his right to a transcript at public expense if he could not afford one. He was not even permitted the opportunity of asking the Court for permission to withdraw his plea of guilty (EH 21-22).

Even where no specific promise was made and a guilty plea was entered as a result of a grave misunderstanding solely on the part of the defense counsel and not participated in by either the prosecution or the Judge, the interest of justice requires that the Defendant be relieved of the plea and the judgment of the conviction vacated. *U. S.* v. *Gilligan*, 256 F.Supp. 244.

At the Evidentiary Hearing, fifteen (15) years after his arrest, Mr. Martin testified that he did not recall the names of the officers who made the promise of the ten (10) year sentence; but at the time the promise was made, the Respondent was an indigent, nineteen-year-old Negro boy in jail awaiting trial for allegedly raping a white woman and had been beaten by a police officer.

The record clearly shows that the Respondent did not receive court-appointed counsel until six (6) days after his arrest in one case and not until thirteen (13) days after his arrest in two (2) other cases. In the Evidentiary Hearing in Federal Court, the Respondent testified concerning the only time that he saw or spoke with his court-appointed counsel before sentencing. At pages 19 and 20 of

the transcript of the Evidentiary Hearing, the following testimony appears:

"Q What happened then?

A I was in the County Jail and he came up and taken me out. He came by and he says, 'Are you Frank Martin?' I says, 'Yes, sir.' He said, 'I'd like to speak with you.' So we go back into one of the conference rooms. He says, 'Well, Frank,' he says, 'You understand I am to represent you in Court and to plead your case guilty, plead you guilty.' And I said, 'All right.' He says, 'Well, I'll see you in Court.' That was it.

Q Did you have any discussion with him about any sentence or any time?

A I assumed that I had made a package deal for ten (10) years."

An attorney cannot be adequately prepared without proper consultation with his client.

> "The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to common and fundamental ideas of fairness and right . . ." *Betts* v. *Brady*, 316 U.S. 455 (1942).

The evidence clearly shows that the Respondent was placed under arrest on January 12, 1952. Preliminary Informations were not filed until January 16, 1952, and the Respondent was not taken to nor did he appear before a committing magistrate until January 16, 1952, on one charge and not until January 24, 1952, on the other charges. This is an unnecessary and unexplained delay of twelve (12) days on the latter charges.

The evidence clearly shows that the Respondent was not advised of his legal right to counsel or of his right to remain silent before making any statements.

Hilton Geer, a detective of the Oklahoma City Police Department at the time Respondent was arrested, testified that the Respondent was arrested and booked on the 12th day of January, 1952, and charges were not filed until the 16th day of January, 1952 (EH 73-74).

Hilton Geer further testified, as reflected on page 74 of the Transcript of Proceedings at Evidentiary Hearing:

"Q You do recall around the station house some talk about a couple of men getting in trouble over beating this defendant up?

A Later on, yes."

The evidence clearly shows that at least one of the alleged confessions was taken after the beating of the Respondent by an Oklahoma City policeman. The Respondent could not know why he was being beaten if such beating was for some other reason than obtaining a confession as Petitioner has alleged in lower courts.

The evidence clearly shows that the Respondent was advised at the times both alleged confessions were taken that if he cleared up certain matters, he would receive a sentence of ten (10) years' imprisonment and that the Respondent relied upon said promise.

The failure to inform a Defendant of his rights before taking a confession was held to be a factor, among others, to be taken into consideration in determining the voluntariness of the confession. *Watts* v. *Indiana,* 338 U.S. 49.

The retroactivity of the decision in *Miranda* v. *Arizona*, 1966, cited 384 U.S. 436, establishing certain standards with respect to interrogation of suspects by police, does not affect the duty of the courts to consider claims that a statement was taken in circumstances which violate the standards of voluntariness which had evolved in earlier United States Court decisions. The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in the federal prosecutions. This standard is grounded in the policies of the privilege against self-incrimination. *Davis* v. *North Carolina*, 384 U.S. 737.

The Respondent does not contend that the confessions were used as evidence to convict him, but he does contend that because of the fact that the "confessions" had been made, extra added inducements were present which caused the Respondents' pleas of guilty to be involuntary and thus void.

> "The fact that a Defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation as now required by Miranda is a significant factor considering the voluntariness of statements later made. This factor has been recognized in several of our decisions delineating standards of voluntariness." *Davis* v. *North Carolina*, 384 U.S. 737; also, *Culombe* v. *Connecticut*, 367 U.S. 568, page 610; *Turner* v. *Pennsylvania*, 338 U.S. 64, page 64.

The fact that Mr. Martin was never effectively advised of his rights gives added weight to other circumstances which made his confessions involuntary and void.

Here the Respondent was a nineteen-year-old Negro boy with little education, less money, and in an Oklahoma jail in the year 1952.

The only conclusion available, and that which the Federal District Court reached, was that Mr. Martin was arrested, promised ten (10) years, beaten, filed against after an unexplained four (4) day delay, and hastily processed through the courts without advice of or consultation with his court-appointed attorney.

In *U. S.* v. *LaVallee*, 282 F.Supp. 718, the Court said that to resolve the issue of voluntariness, the Court must consider and weigh totality of the surrounding circumstances, including accused's age, physical condition, education and mental capacity, background and experience, time of day, duration and type of interrogation and extent to which he was aware of his rights and had access to his friends, relatives or independent counsel.

CONCLUSION

The United States District Court for the Western District of Oklahoma, from the testimony and evidence introduced at the Evidentiary Hearing, found that the Respondent had entered the pleas of guilty involuntarily. The United States Court of Appeals for the Tenth Circuit stated in the last sentence of the Court's per curiam opinion:

> "The trial court, having so found, is supported by the record and the judgment is AFFIRMED."

The foregoing reasons for denying the Petition for Writ of Certiorari in this case supports the opinions of the lower Federal Courts.

WHEREFORE, Respondent respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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